82-1060

No. A-426
IN THE

Supreme Court of the United States

October Term, 1982

ROBERT P. GOUVEIA,

Petitioner,

vs.

NAPILI-KAI, LTD.,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Hawaii.

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QUESTION PRESENTED

Did the Supreme Court of the State of Hawaii err in deciding that petitioner's common law, non-statutory, tort claims against his employer, respondent, for wrongful breach of an employment agreement, which claims were not within the ambit of the National Labor Relations Act [29 U.S.C §151-168], are pre-empted by said Act?

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases — Page

Statutes — Page

Rules

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NAPILI-KAI, LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Petitioner Robert P. Gouveia respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of the State of Hawaii rendered in this proceeding on August 16, 1982.

OPINION BELOW

The opinion of the Supreme Court of the State of Hawaii is reported at 65

Haw.___, ___ P. 2d ___ (1982) and appears in Appendix A hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Hawaii was entered on August 16, 1982. Notice and entry of judgment on appeal was entered September 21, 1982. Petitioner's application for an extension of time within which to file the petition for a writ of certiorari was granted on November 10, 1982 extending the time within which to file a petition for a writ of certiorari to and including December 20, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

Section 157. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in §8(a)(3) [29 USC §158(a)(3)].

* * *

Section 158(a). It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USC §157];

(3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage

or discourage membership in any labor organization: Provided, That nothing in this Act [29 USCS §§151-158, 159-168], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as aprovided in section 9(a) [29 USCS § 159(a)], in the appropriate collective-bargaining unit covered by such agreement when made and (ii) unless following an election held

as provided in section 9(e) [29 USCS §159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believed that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a

condition of acquiring or retaining membership.

* * *

U.S. Constitution Article VI, Cl.2:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

* * *

STATEMENT OF THE CASE

Respondent, at the time of the conduct complained of, was a Hawaii corporation, dba Napili Kai Beach Club, operating a resort hotel facility at Napili, Island and County of Maui, State of Hawaii.

Petitioner was employed by respondent on approximately March 3, 1975, to work in respondent's personnel and accounting department. Respondent advised petitioner, prior to such employment, that the wages to be paid by respondent to petitioner were consistent with or above, union scale.

When hired, petitioner was paid at an hourly rate of $4.37. In March of 1976, petitioner received a six per cent (6%) cost of living increase. During the same month, respondent told petitioner that he was employed in the capacity of "paymaster" and advised petitioner that union scale for the type of job performed by petitioner was $4.85 per hour.

Petitioner relied upon respondent's representation and accepted said hourly wage.

In December of 1976, petitioner discovered that respondent had misrepresented to him what union scale, in force and effect as of March, 1976, was for petitioner's job category.

Petitioner then attempted to engage in collective bargaining with respondent to obtain union scale compensation for and on behalf of himself and other Napili Kai employees similarly situated

As a direct and proximate result of petitioner's attempt to negotiate an hourly wage rate consistent with union scale, together with other employee benefits, respondent terminated petitioner's employment on December 20, 1976.

Inasmuch as respondent's termination of petitioner's employment occurred five days before Christmas, 1976, and inasmuch as there was no justifiable or other lawful cause for

respondent firing petitioner, respondent's termination of petitioner's employment was willfully malicious, intended to cause petitioner severe and substantial mental distress.

On or about February 9, 1977, petitioner filed a "Charge Against Employer" with the National Labor Relations Board (NLRB), alleging that his termination was in violation of §§8(a)(1) and (3) of the NLRA [29 U.S.C §§158(a)(1), (3)] arguing:

> [t]he above-named employer, in order to discourage membership in a labor organization, discriminated in regard to the hire and tenure of employment and to the terms and conditions of employment of its employee, ROBERT P. GOUVEIA, on December 20, 1976 and thereafter.

Sections 8(a)(1) and (3) of the NLRA provide:

> It shall be an unfair labor practice for an employer --
>
> (1) To interfere with, restrain,

> or coerce employees in the exercise of the rights guaranteed in section 7;
>
> . . .
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

Section 7 of the NLRA, in relevant part, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Thereafter, on May 16, 1977, petitioner and respondent entered into a settlement agreement resolving petitioner's unfair labor practice charge brought before the NLRB. Under the terms of that settlement agreement, respondent was to pay, and did pay,

petitioner the sum of $2,000.00 which sum constituted compensation for "back pay" only. The NLRB approved said settlement on May 5, 1979.

On August 4, 1977, the Regional Director for Region 20 of the NLRB closed petitioner's case against respondent inasmuch as respondent had complied with the settlement agreement requirements.

Approximately three months after the unfair labor practice case was closed, petitioner filed the instant lawsuit alleging claims for relief different from that sought, available, and accorded petitioner in the NLRB proceeding.

Respondent moved to dismiss petitioner's complaint below on the basis that petitioner's claim was pre-empted by the NLRB.

Petitioner responded, noting that his complaint sought general damages for deceit, negligent and/or intentional infliction of emotional distress and punitive damages for malicious and outrageous conduct committed by respondent.

The above claims for relief and remedies had not been asserted by petitioner in the NLRB proceeding; nor could they have been. The NLRB did not have jurisdition to entertain such claims had they been asserted.

The Hawaii State trial court denied respondent's motion to dismiss on January 6, 1978 and granted respondent right to appeal denial of respondent's motion. On February 28, 1978, respondent appealed from the trial judge's ruling to the Supreme Court of the State of Hawaii.

The judgment of the trial court was reversed by the Supreme Court of the State of Hawaii and petitioner's complaint was dismissed on the sole ground that petitioner's claims were pre-empted by the NLRB.

REASONS FOR GRANTING THE WRIT

The Hawaii Supreme Court Erroneously Decided That Petitioner's Tort Claims Were Pre-empted by the NLRA When (1) the Damages Sought by Petitioner Could Not Have Been, Nor Were They, Brought Before the NLRB, (2) the State of Hawaii Had a Valid Interest in Regulating the Type of Conduct Engaged in by Respondent and (3) Hawaii's Recognition of Petitioner's Claims Would Not Intrude Upon the Federal Regulatory Labor Scheme. Moreover, the Decision of the Supreme Court of the State of Hawaii Conflicts with, inter alia, Decisions of this Court in Point.

Pertinent allegations of petitioner's complaint are:

> 4. At all times relevant complained of herein, plaintiff was an employee of defendant having been hired by defendant on or about March 3, 1975, to perform work, services, and labor in the personnel and accounting departments of defendant.
>
> 5. Prior to plaintiff becoming so employed, defendant advised plaintiff that defendant paid wages consistent with "union scale or above".
>
> 6. Relying on defendant's aforesaid representations, plaintiff became employed by defendant as above mentioned.
>
> 7. In or about March of 1976, plaintiff was advised by defendant that defendant would provide plaintiff a six per cent (6%) cost of living wae increase at which time further wage discussion and/or negotiation ensued in which plaintiff and defendant were involved.
>
> 8. As a portion of the aforesaid wage negotiation and/or discussion, defendant represented and advised plaintiff that union scale

for the type of job performed by plaintiff was payable at the hourly rate of $4.85.

9. Relying on defendant's aforesaid assertion, representation and warranty, plaintiff accepted the hourly wage rate above mentioned.

10. In December of 1976, plaintiff was advised and/or became aware of the fact that defendant had misrepresented and misstated to plaintiff union scale in force and effect as of March, 1976, and thereafter.

11. The conduct of defendant, mentioned above, was negligent.

12. The conduct of defendant, mentioned above, was engaged in with an intent to deceive plaintiff and/or cause him to rely thereupon, which reliance was justifiably made by plaintiff and caused plaintiff detriment.

13. In or about December, 1976, plaintiff advised defendant of defendant's aforesaid conduct and attempted to engage in collective bargaining with defendant in connection therewith.

14. As a direct and proximate result of

plaintiff attempting to negotiate an hourly wage rate consistent with union scale, together with other employee benefits, on or about December 20, 1976, defendant terminated plaintiff's employment with defendant.

15. Inasmuch as defendant's termination of plaintiff's employment with defendant occurred five days before Christmas, 1976, and inasmuch as there was no justifiable cause for defendant firing plaintiff, defendant's termination of plaintiff's employment with defendant was willfully malicious, and intended to cause plaintiff severe and substantial mental distress.

16. As a direct and proximate result of defendant's aforesaid conduct, plaintiff suffered economic loss in an amount as shall be proved at time of trial, together with great and severe physical injury and mental distress, medical expense necessary for the treatment thereof, and other damages as shall be proved at time of trial.

WHEREFORE, upon a hearing hereof, plaintiff prays that judgment be entered in his favor and against defendant, for such special, general

> and punitive damages as to which plaintiff shall be entitled pursuant to proof adduced at trial, interest thereon, costs of suit, attorney's fees and/or commissions, and such other and further relief as to which plaintiff shall be entitled pursuant to Rule 54(d), Hawaii Rules of Civil Procedure.

Petitioner's complaint contains allegations sufficient to sustain claims for negligent and/or intentional discharge, infliction of mental distress, misrepresentation and fraud.

Petitioner's claims were not pre-empted by the NLRB; the complaint should not have been dismissed.

In Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25, 430 U.S. 290 (1977), plaintiff-employee filed a complaint alleging that union officials had intentionally engaged in outrageous conduct, threats and other forms of

intimidation as a result of which he suffered emotional distress.

Defendant responded that the NLRA pre-empted Farmer's claim for intentional infliction of emotional distress. At trial, a jury returned a verdict of actual and punitive damages in favor of Farmer upon which judgment was entered.

The intermediate appellate California court reversed, holding that the state court had no jurisdiction over the complaint, holding that the conduct involved was arguably subject to the jurisdiction of the NLRB. The California Supreme Court denied review. This Court reversed the California decision remanding for a new trial.

In discussing the doctrine of pre-emption, this Court stated:

> The doctrine of pre-emption in labor law has been shaped primarily by two competing

> interests. On the one hand, this Court had recognized that 'the broad powers conferred by Congress upon the National Labor Relations Board to interpret and to enforce the complex Labor Management Relations Act . . . necessarily imply that potentially conflicting "rules of law, of remedy, and of administration" cannot be permitted to operate.' Vaca v. Sipes, 386 U.S. 171, 178-179, 87 S.Ct. 903,910, 17 L.Ed. 2d 842 (1969), quoting San Diego Bldg. Trades Council v. Garmon, (citation omitted) on the other hand, because Congress has refrained from providing specific directions with respect to the scope of pre-empted state regulation, the Court has unwilling to 'declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions . . . . ' Motor Coach Employees v. Lockridge (citation omitted). 430 U.S. 295,296, 51 L.Ed.2d 347, 97 S.Ct. 1061.

This Court went on to discuss the general rule set forth in San Diego Bldg. Trades Counsel v.Garmon, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 733 (1959):

But the same considerations that underlie the Garmon rule have led the court to recognize exceptions in appropriate classes of cases. We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of Garmon if that activity 'was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act.' Garmon, supra, at 243, 244, 3 L.Ed. 2d 775, 79 S.Ct. 773. See, e.g., Linn v. Plant Guard Workers, 383 U.S. 53, 15 L. Ed.2d 582, 86 S.Ct. 657 (1966) (malicious libel); Automobile Workers v. Russell, 356 U.S. 634, 2 L.Ed.2d 1030, 78 S.Ct. 932 (1958) (mass picketing and threats of violence); Machinists v. Gonzales, 356 U.S. 617, 2 L. Ed.2d 1018, 78 S.Ct. 923 (1958) (wrongful expulsion from union membership). We have also refused to apply the pre-emption doctrine 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered

> that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes.' (citations omitted) 430 U.S. 297, 51 L.Ed.2d 348, 97 S.Ct. 1061, 1062.

This Court concluded that these exceptions in no way undermined the vitality of the pre-emption rule but, to the contrary, highlighted the Court's responsibility, in a case of this kind, to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme. 430 U.S. 297.

In Farmer, this court reviewed Linn v. Plant Guard Workers, 383 U.S. 53 (1966), and adopted the three areas of inquiry stated therein which established exceptions to the pre-emption doctrine.

These factors were: (1) whether the underlying conduct complained of, which forms the basis for the state action, is protected by the NLRA; (2) whether a state has an overriding state interest in protecting its citizens from the type of conduct complained of; and (3) whether the state's entertainment of the cause of action will interfere with the effective administration of national labor policy. 430 U.S. 298 The Court then applied the Linn scrutiny to the facts in Farmer carving out an exception to Garmon's general rule of pre-emption.

In considering the first area of inquiry, this Court, in Farmer, noted:

> No provision of the National Labor Relations Act protects the 'outrageous conduct' complained of by petitioner Hill in the second count of the complaint. Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for

> conduct on the part of the union officers which is so outrageous that 'no reasonable man in a civilized society should be expected to endure it'. (citation omitted) Thus, as in Linn v. Plant Guard Workers 383 U.S. 53, 15 L.Ed.2d 582, 86 S.Ct. 657 (1966), and Automobile Workers v. Russell, 356 U.S. 634, 2 L.Ed.2d 1030, 78 S.Ct. 932 (1966), permitting the exercise of state jurisdiction over such complaints does not result in state regulation of federally protected conduct. 430 U.S. 302, 51 L.Ed.2d 351, 97 S.Ct. 1064, 1065.

Petitioner submits, firstly, that no provision of the NLRA protects the conduct complained of respondent in petitioner's complaint. Maintenance of state court jurisdiction, in the instant case, would not result in unwarranted state regulation of, or intrusion upon, federally protected conduct.

The second inquiry discussed in Farmer concerned state interest in protecting citizens from the type of conduct complained of.

> That interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury, as in Russell, or damage to reputation as in Linn. Although recognition of the tort of intentional infliction of emotional distress is a comparatively recent development in state law, (citation omitted) our decisions permitting the exercise of state jurisdiction in tort actions based on violence or defamation have not rested on the history of the tort at issue, but rather on the nature of the state's interest in protecting the health and well-being of its citizens. 430 U.S. 302, 303, 51 L.Ed. 2d 351, 352, 97 S.Ct. 1065.

Farmer recognized the potential for some risk that the state cause of action for infliction of emotional distress might touch on an area of primary federal concern.

> Viewed, however, in light of the discrete concerns of the federal scheme and the

state tort law, that potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens. If the charges in Hill's complaint were filed with the Board, the focus of any unfair labor practice proceeding would be on whether the statements or conduct on the part of union officials discriminated or threatened discrimination against him in employment referrals for reasons other than failure to pay union dues . . . . Whether the statements or conduct of the respondents also caused Hill severe emotional distress and physical injury would play no role in the Board's disposition of the case, and the Board could not award Hill damages for pain, suffering, or medical expenses. Conversely, the state court tort action can be adjudicated without resolution of the 'merits' of the underlying labor dispute . . . . The state court need not consider, much less resolve, whether a union discriminates against an employee in terms of employment opportunities. To the contrary, the tort action can be resolved without reference to any accomodation of the special interests of unions and

> members in the hiring hall context. 430 U.S. 304. (emphasis supplied)

This Court continued:

> On balance, we cannot conclude that Congress intended to oust state court jurisdiction over actions for tortious activity such as that alleged in this case. 430 U.S. 305, 51 L.Ed. 353, 97 S.Ct. 1066.

Petitioner's claim, when scrutinized under the Linn tests, is not pre-empted; the underlying conduct is not protected by the NLRA; there is an overriding state interest in protecting citizens from respondent's conduct; state action on petitioner's cause of action would not have interfered with national labor policy.

Further, in Farmer, supra, this Court held that NLRA had no jurisdiction or power to award the type of damages sought by petitioner herein.

Inasmuch as petitioner could not claim damages for mental distress, etc., in the administrative hearing before the NLRB, the decision of the Supreme Court of the State of Hawaii that petitioner's claims are pre-empted by the NLRA is erroneous and in direct conflict with the previous rulings of this Court.

Recently, in Cancellier v. Federated Dept. Stores, 672 F.2d 1312 (1982), the United States Court of Appeals for the Ninth Circuit held that the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634 (1976 & Supp. II 1978), did not pre-empt an award of tort damages on pendent state claims.

In Cancellier, plaintiffs were former executives of defendant. In early 1978 they were terminated after having been employed with defendant for a period of time ranging from seventeen

to twenty-five years. In July of 1979 plaintiffs brought an action in the United States District Court for the Northern District of California alleging that their terminations violated ADEA provisions. Plaintiffs sought back pay, liquidated damages, reinstatement to their former positions, and an injunction against further age discrimination by defendant. Plaintiffs also raised claims under California law for breach of employment contract, breach of the implied covenant of good faith and fair dealing, and fraud. The Ninth Circuit Court of Appeals, in holding that plaintiffs' claims were not pre-empted by the ADEA, reasoned:

> The ADEA does not pre-empt the award of tort damages on pendent state claims. Kelly v. American Standard, Inc., 640 F.2d 974, 983 (9th Cir. 1981) (upholding emotional distress damages under state

age discrimination statute). The award of tort damages on state claims here did not duplicate ADEA relief. Plaintiffs' ADEA claims were based on age discrimination in firing. Plaintiffs' contract and covenant claims were based on I. Magnin's obligation not to deal arbitrarily or unfairly in terminating plaintiffs' employment, an obligation created by I. Magnin's personnel policies and the fact of long service by the employee.[6] Punitive and emotional distress damages for this violation, unavailable under the ADEA, do not duplicate the ADEA award for back pay, lost benefits, and liquidated damages. While the wisdom of allowing open-ended state claims for breach of the implied covenant to coexist with ADEA claims whose financial redress Congress has carefully limited to specific damage elements, see 29 U.S.C. §626(b)(1976); Kelly v. American Standard, Inc., 640 F.2d at 983 n.14, is arguable, it is for Congress, not us, to decide whether state common law remedies trench too closely

on the federal scheme.
F.2d 1318. (emphasis supplied)

In Sherman v. St. Barnabas Hospital, 535 F.Supp. 564 (S.D.N.Y. 1982), the federal district court held that the issue of whether matters involving activities are arguably protected by the NLRA and are to be deferred to the NLRB hinges on the aggrieved party's ability to present the issue before the NLRB; that pre-emption is necessary only in situations in which the aggrieved party has a reasonable opportunity either to invoke NLRB jurisdiction or induce his adversary to do so. In so holding, the Court relied upon this Court's decision in Sears, Roebuck & Co. v. San Diego Distrist Counsel of Carpenters, 436 U.S. 180 (1978), where it was held that if the damages sought in the state court proceedings could not have been granted

in the federal labor hearing, no pre-emption existed. 535 F.Supp. 576.

The facts in Sherman involved a hospital employee who alleged that the union had pressured the hospital into discharging him from his position as the director of the food services department in retaliation for his refusal to agree to the union's preferential hiring and scheduling demands. Sherman brought an action to recover damages against the hospital and the union for abusive discharge as noted below.

On motions to dismiss and a motion for summary judgment brought by defendant employer, the federal district court held: (1) under New York law, the employee could maintain a cause of action against the hospital for abusive discharge; (2) the employee's claims against the union were not pre-empted by the otherwise exclusive jurisdiction of

NLRB and (3) New York's three year property damage statute of limitations was applicable to claims against union for abusive discharge, tortious interference with contractual relationship and tortious interference with advantageous economic relationship.

Thus it is clear that because petitioner's claims for mental distress, breach of warranty, fraud, intentional and negligent misrepresentation, etc., did not duplicate the relief accordable by or received from the NLRB, such are not pre-empted by the NLRA.

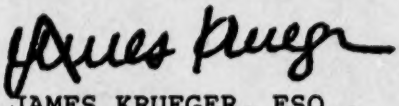
Accordingly, the decision of the Supreme Court of the State of Hawaii is in direct conflict with the decisions of this Court as well as those of other enlightened jurisdictions.

CONCLUSION

Based upon the foregoing reasons and authorities, petitioner submits that

a writ of certiorari should issue from this court to review the decision and judgment of the Hawaii Supreme Court.

Respectfully submitted,



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SUPREME COURT OF HAWAII—1

Syllabus

ROBERT P. GOUVEIA, Plaintiff-Appellee, *v.* NAPILI-KAI, LTD., a Hawaii corporation, dba NAPILI KAI BEACH CLUB, Defendant-Appellant

NO. 6965

APPEAL FROM THE SECOND CIRCUIT COURT
HONORABLE S. GEORGE FUKUOKA, JUDGE

(CIVIL NO. 3527)

AUGUST 16, 1982

RICHARDSON, C.J., LUM, NAKAMURA, JJ.,
AND RETIRED JUSTICES OGATA AND MENOR
ASSIGNED TEMPORARILY

LABOR RELATIONS — *labor relations boards and proceedings — in general — exclusive, concurrent, and conflicting jurisdiction.*

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.

SAME — *same — same — same.*

When an activity is arguably subject to § 7 or § 8 of the National Labor Relations Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

SAME — *labor relations acts — validity — effect of federal legislation.*

The National Labor Relations Act, however, leaves much to the states. Where, for example, the challenged conduct, although occurring in a labor relations context, has been marked by violence and imminent threats to the public order, the United States Supreme Court has allowed the states to grant compensation for the consequences, as defined by the traditional law of torts.

SAME — *labor relations boards and proceedings — in general — exclusive, concurrent, and conflicting jurisdiction.*

The Supreme Court has not found a congressional intent to withdraw state power to regulate an activity that is a merely peripheral concern of the National Labor Relations Act.

SAME — *same — same — same.*

The Supreme Court has permitted state regulation where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not infer that Congress has deprived the states of power to act.

SAME — *same* — *same* — *same*.

The Supreme Court has permitted concurrent state-court jurisdiction over a tort occurring in a context of discrimination in employment, as proscribed by the National Labor Relations Act, where the discrimination does not itself form the underlying "outrageous" conduct upon which the state-court tort action is based.

OPINION OF THE COURT BY NAKAMURA, J.

The question posed by this interlocutory appeal is whether the Circuit Court of the Second Circuit can entertain a suit for damages resulting from the allegedly unlawful termination of Plaintiff-appellee Robert P. Gouveia's employment by Napili-Kai, Ltd., an employer subject to the National Labor Relations Act. Since Gouveia's complaint avers the discharge stemmed from an attempt to engage in collective bargaining with the employer and federal law and procedures govern the employer's obligations in this regard, we conclude the circuit court erred in denying Napili-Kai's motion to dismiss the action.

I.

The complaint contains the following allegations: Gouveia was hired by Napili-Kai to work in its personnel and accounting departments at a pay rate of $4.85 per hour on March 3, 1975; the employer represented at the time of hire that the foregoing wages were at the "union scale or above"; a year later when Gouveia was given a six percent wage increase, Napili-Kai again represented that the wages were at the "union scale"; when Gouveia learned in December of 1976 that he was not being so compensated, he "attempted to engage in collective bargaining with defendant;" Napili-Kai terminated his employment on December 20, 1976 "as a direct and proximate result of plaintiff attempting to negotiate an hourly wage rate consistent with union scale, together with other employee benefits."

On February 11, 1977, prior to the filing of the complaint, Gouveia brought an unfair labor practice charge against Napili-Kai before the National Labor Relations Board (the NLRB), claiming that his discharge was in violation of §§ 8(a)(1) and 8 (a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(3).

The charge alleged that Napili-Kai "discriminated in regard to the hire and tenure of employment"[1] of Robert P. Gouveia on December 20, 1976 and thereafter "in order to discourage membership in a labor organization." On May 16, 1977, Gouveia and Napili-Kai executed a settlement agreement under the aegies of the NLRB, whereby Napili-Kai agreed to make Gouveia "whole" by the payment of $2,000 without admitting it had violated the federal law.[2] Subsequently, the NLRB informed both parties that the employer had complied with all requirements of the Board-sponsored settlement and closed the case.

Gouveia initiated his state action against Napili-Kai approximately three months after the NLRB notified the parties of the termination of the unfair labor practice proceeding. Napili-Kai responded with a motion to dismiss the suit, averring the claim was barred by res judicata and collateral estoppel and the doctrine of federal preemption. The circuit court denied the motion, but allowed the defendant to seek immediate review of the interlocutory order in this court.

II.

A.

We are again called upon to decide whether State law has been deprived of effect by the Supremacy Clause of the federal constitution, which provides that the "Constitution, and the Laws of the United States . . . made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of

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[1] "[D]iscrimination in regard to hire and tenure and to the terms and conditions of employment" is the phrasing normally employed by agents of the National Labor Relations Board in charging an unlawful termination of employment.

Section 8(a)(3) declares it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." It covers discharge from employment, as well as numerous other acts. *See* C. Morris, *The Developing Labor Law* 117 (1971).

[2] The settlement document was a form agreement supplied by the NLRB. The executed agreement was approved by the agent of the Board in Honolulu and the Regional Director of the Board.

any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. But "there is no unerring test to determine just when . . . [state law] is without effect by reason of preemption." *In re Tax Appeal of Aloha Airlines, Inc.*, 65 Haw. ___, ___, ___ P.2d ___, ___ (No. 7078, filed June 23, 1982). The Supreme Court teaches us the touchstone here is congressional intent and there are several ways in which this may be gathered. *Id.* at ___, ___ P.2d at ___. As it recently reiterated in *Maryland v. Louisiana*, 451 U.S. 725 (1981), a purpose to displace state law "may be evidenced in several ways":

> "The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 263 U.S. 439; *Charleston & W. C. R. Co. v. Varnville Co.*, 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co.* [272 U.S. 605]. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U.S. 538".

Id. at 746-47, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). And,

> [o]f course, a state statute is void to the extent it conflicts with a federal statute — if, for example, "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, supra*, at 67.

Maryland v. Louisiana, supra, 451 U.S. at 747.

In the area of concern, Labor Law, the Court has augmented these general principles with decisional rules of particular application. A landmark case, *Garner v. Teamsters Union*, 346 U.S. 485 (1953), involved picketing which a state court enjoined on grounds

that it violated state statutory provisions similar to the unfair labor practice provisions of the federal labor relations statute. The issue before the Court was "whether the State, through its courts, may adjudge the same controversy and extend its own form of relief." *Id.* at 489. In denying the state tribunal's power to enjoin the conduct, the Court *inter alia* held:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, compliant and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.

Id. at 490.

Though a number of significant labor preemption decisions followed on *Garner's* heels, the most noteworthy was *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). For these oft-quoted passages therefrom express what are still acknowledged to be the controlling rules in the relevant area:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield . . . [T]o allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.
>
> At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board.
>
> . . . When an activity is arguably subject to § 7 and § 8 of the Act, the States as well as the federal courts must defer to the

> exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Id. at 244-45. "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." *Id.* at 246 (footnote omitted). Hence, federal law and federal procedures unquestionably determine the obligations of employers who are subject to the Act where the organizational activities of their employees and collective bargaining are concerned.[3]

B.

Yet the "Act . . . leaves much to the states, though Congress has refrained from telling us how much." *Garner v. Teamsters Union, supra,* 346 U.S. at 488. This reticence has impelled the Court to "spell out from conflicting indications of congressional will the area in which state action is still permissible." *Id.* Where, for example, the challenged conduct has been "marked by violence and imminent threats to the public order," the Court has "allowed the States to grant compensation for the consequences, as defined by the traditional law of torts." *San Diego Building Trades Council v. Garmon, supra,* 359 U.S. at 247. *See, e.g., United Automobile Workers v. Russell,* 356 U.S.

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[3] Section 7 of the National Labor Relations Act describes the rights of employees thereunder; it reads:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8 delineates and describes employer practices proscribed as unfair labor practices by the Act. It reads in pertinent part:

> Sec. 8. (a) It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

634 (1958); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954). "State jurisdiction . . . prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." *San Diego Building Trades Council v. Garmon, supra,* 359 U.S. at 247.

"[D]ue regard for the presuppositions of our embracing federal system" has also led the Court "not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the . . . Act." *Id.* at 243. The Court has likewise permitted state regulation "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, . . . [it] could not infer that Congress had deprived the States of power to act." *Id.* at 244 (footnote omitted). Thus in *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966), the redress of libelous statements was held to be a " 'merely peripheral concern of the . . . Act,' provided it . . . [was] limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false." *Id.* at 61. " '[A]n overriding state interest' in protecting its residents from malicious libels . . . [was] recognized in these circumstances." *Id.*

A state's interest in protecting the health and well-being of its citizens that overrode the federal interest in a national labor policy was also found in *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290 (1977). The tortious conduct of the defendants, a union and some of its officers, arose from the operation of a hiring hall and involved "outrageous conduct, threats, intimidation, and words" which caused the plaintiff to suffer "grievous mental and emotional distress as well as great physical damage." *Id.* at 301. The Court concluded Congress did not intend in this situation that exclusive jurisdiction should lie with the Board. For

> [n]o provision of the National Labor Relations Act protects the "outrageous conduct" complained of by petitioner Hill in the second count of the complaint. Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct on the part of union officers which is so outrageous that "no reasonable man in a civilized society should be expected to endure it." See *supra,* at 294. Thus, as in *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966),

> and *Automobile Workers v. Russell*, . . . [356 U.S. 634 (1958)], permitting the exercise of state jurisdiction over such complaints does not result in state regulation of federally protected conduct.

Id. at 302.

At the same time, however, the Court cautioned that concurrent state-court jurisdiction was impermissible where a realistic threat of interference with the federal regulatory scheme existed. Its further statement in this regard was:

> Union discrimination in employment opportunities cannot itself form the underlying "outrageous" conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle. Nor can threats of such discrimination suffice to sustain state-court jurisdiction. It may well be that the threat, or actuality, of employment discrimination will cause a union member considerable emotional distress and anxiety. But something more is required before concurrent state-court jurisdiction can be permitted. Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.

Id. at 305 (footnote omitted). Though the plaintiff had obtained a judgment in the trial court which had been set aside by the state appellate court on grounds of preemption, the Court chose to remand the case for a new trial rather than to reinstate the judgment.[4]

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[4] The Court's statement with respect to the judgment was:

> Although the second count of petitioner's complaint alleged the intentional infliction of emotional distress, it is clear from the record that the trial of that claim was not in accord with the standards discussed above. The evidence supporting the verdict in Hill's favor focuses less on the alleged campaign of harassment, public ridicule, and verbal abuse, than on the discriminatory refusal to dispatch him to any but the briefest and least desirable jobs; and no appropriate instruction distinguishing the two categories of evidence was given to the jury. *See* n. 13, *supra*. The consequent risk that the jury verdict represented damages for employment discrimination rather than for instances of intentional infliction of emotional distress precludes reinstatement of the judgment of the Superior Court.

Farmer v. United Brotherhood of Carpenters, *supra*, 430 U.S. at 306-07 (footnote omitted). Note 13 *supra*, at 305 reads:

> In view of the potential for interference with the federal scheme of regulation, the trial court should be sensitive to the need to minimize the jury's exposure to

A regard for the interests of the states in our federal system has thus induced judicially recognized exceptions to the *Garmon* doctrine. And state regulation of tortious conduct involving violence or threats thereof, malicious libel, and truly outrageous conduct is not precluded, provided of course that the outrageous conduct is unrelated to the practice prohibited by the federal law or does not form the basis of the prohibited practice.

III.

Gouveia asserts his action for damages in the circuit court falls within the exception fashioned in *Farmer;* he contends the suit is premised on an intentional infliction of mental distress which has been deemed actionable in Hawaii. Still, we are not convinced that the claim can be prosecuted without undermining the preemption doctrine.

The gravamen of the one-count complaint is that the termination of plaintiff's employment "was willfully malicious, and intended to cause plaintiff severe and substantial mental distress."[5] "It may well be that the . . . employment discrimination . . . [caused] considerable emotional distress and anxiety. But something more is

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evidence of employment discrimination in cases of this sort. Where evidence of discrimination is necessary to establish the context in which the state claim arose, the trial court should instruct the jury that the fact of employment discrimination (as distinguished from attendant tortious conduct under state law) should not enter into the determination of liability or damages.

[5] The heart of plaintiff's claim for relief reads as follows:

14. As a direct and proximate result of plaintiff attempting to negotiate an hourly wage rate consistent with union scale, together with other employee benefits, on or about December 20, 1976, defendant terminated plaintiff's employment with defendant.

15. Inasmuch as defendant's termination of plaintiff's employment with defendant occurred five days before Christmas, 1976, and inasmuch as there was no justifiable cause for defendant firing plaintiff, defendant's termination of plaintiff's employment with defendant was willfully malicious, and intended to cause plaintiff severe and substantial mental distress.

16. As a direct and proximate result of defendant's aforesaid conduct, plaintiff suffered economic loss in an amount as shall be proved at time of trial, together with great and severe physical injury and mental distress, medical expense necessary for the treatment thereof, and other damages as shall be proved at time of trial.

required before concurrent state-court jurisdiction . . . [is] permitted." *Farmer v. United Brotherhood of Carpenters, supra,* 430 U.S. at 305. For "discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state-court tort action is based; to hold otherwise would undermine the preemption principle." *Id.*

Gouveia complains here of a malicious termination of employment on December 20, 1976; the discharge was also the "discrimination in regard to hire and tenure of employment" that formed the basis of the unfair labor practice charge presented to the NLRB and settled with the Board's approval. But as we have seen, there is no room for state-court jurisdiction over what was the subject of an NLRB proceeding under the *Garmon* preemption rules or the *Farmer* exception thereto. "[S]omething more is required before concurrent state-court jurisdiction can be permitted." *Id.*

There was more in *Farmer* than the discrimination in regard to hire and tenure of employment proscribed by the federal law — there was other conduct "so outrageous that 'no reasonable man in a civilized society should be expected to endure it.' " *Id.* at 302. Here, the "willfully malicious" termination of plaintiff's employment is alleged as the direct and proximate cause of his physical injury and mental distress. The "something more" upon which state-court jurisdiction may possibly be predicated is not apparent on the face of the complaint.[6]

The circuit court's order is reversed, and the case is remanded with instructions to dismiss the complaint.

The plaintiff, however, should be granted leave to amend the pleading. For while he failed to state a claim that could be entertained by the circuit court and we have some doubts on whether he will be able to do so, we believe he should not be deprived of the opportunity.

Robert S. Katz (Barry W. Marr with him on opening brief; *Barry W. Marr* and *Howard A. Matsuura* with him on reply brief; *Torkildson, Katz, Jossem & Loden,* of counsel) for defendant-appellant.

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[6] There is also no basis for concluding that the conduct in question falls within one of the other judicially recognized exceptions to the preemption doctrine.

James Krueger (Stephen Goldsmith with him on the brief; *James Krueger,* Attorney at Law, A Law Corporation, of counsel) for plaintiff-appellee.